SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-435

JOHN MICHAEL RYAN,
Petitioner,

v.

LEWIS B. HERSHEY, as Director of the Selective Service System of the United States; MAJOR GENERAL ADAMS, as Director of Selective Service System of the State of Missouri; and ALEX J. ARUNSKI, LOUIS T. SAFFA, ROBERT J. CONCANNON, and JOHN SHEROD, as Members of Selective Service System Local Board No. 235,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

FRANCIS L. RUPPERT
American Civil Liberties Union
111 South Meramec, Suite 420
Clayton, Missouri 63105
Attorney for Petitioner

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477

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IN THE

SUPREME COURT OF THE UNITED STATES

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No. .....

JOHN MICHAEL RYAN,
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v.

LEWIS B. HERSHEY, as Director of the Selective Service System of the United States; MAJOR GENERAL ADAMS, as Director of Selective Service System of the State of Missouri; and ALEX J. ARUNSKI, LOUIS T. SAFFA, ROBERT J. CONCANNON, and JOHN SHEROD, as Members of Selective Service System Local Board No. 235,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled action on June 18, 1971.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, filed June 18, 1971, is not yet reported and is printed in the appendix hereto (A-1 through A-9). The opinion of the United States District Court for the Eastern District of Missouri is printed in the appendix hereto (A-10 through A-16).

JURISDICTION

The opinion in the Eighth Circuit was rendered on June 18, 1971. On June 30, 1971, Petitioner filed a timely Petition for Re-Hearing in the Eighth Circuit, and that Petition was denied on July 15, 1971. The mandate of the Court of Appeals was issued on July 27, 1971. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Petitioner can proceed by way of an action in mandamus under 28 U.S.C. 1361, and declaratory judgment under 28 U.S.C. 2201, to compel reconstitution of his local draft board and to enjoin Respondents from inducting Petitioner into the Armed Forces, or whether the provisions of such regulation can only be enforced by means of *quo warranto* proceedings.

2. Whether the Petitioner can proceed by way of an action in mandamus under 28 U.S.C. 1361, and declaratory judgment under 28 U.S.C. 2201, to compel the Director of the Selective Service System of the United States and the Director of the Selective Service System of the State of Missouri to process Petitioner's post-induction notice claims to classification 1-O (conscientious objector) and classification 3-A (registrant with a child or children; and registrant deferred by reason of extreme hardship to dependents) before a lawfully constituted local draft board.

STATUTES AND REGULATIONS INVOLVED

This case involves the due process clause of the Fifth Amendment to the United States Constitution.

Also involved are the following provisions of the Military Selective Service Act of 1967, see Title 50 U.S.C., Appendix, Sections 451 et seq.:

50 U.S.C., Appendix, Section 460 (b) (3):

> ". . . each member of any local board shall be a civilian who is a citizen of the United States residing in the county or political subdivision corresponding thereto in which such local board has jurisdiction . . ."

32 C.F.R., Section 1604.52 (c), as enacted 1967:

> "The members of local boards shall be citizens of the United States who shall be residents of a county in which their local board has jurisdiction, and who shall also, if at all practicable, be residents of the area in which their local board has jurisdiction."

32 C.F.R., Section 1604.52 (c) as amended 1970:

> "The members of local boards shall be citizens, male or female, of the United States who shall be residents of a county in which their local board has jurisdiction . . ."

32 C.F.R., Section 1604.56:

> "A majority of the members of a local board shall constitute a quorum for the transaction of business. A majority of the members at any meeting at which a quorum is present shall decide any question of classification. Every member present, unless disqualified, shall vote on every question of classification. In case of a tie vote on any question or classification, the board shall postpone action on the question or classification until it can be decided by a majority vote . . ."

Section 10 (b) (3), 50 App. U.S.C., Section 460 (b) (3):

> ". . . No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title (section 462 of this Appendix), after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: **Provided**, That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant . . ."

STATEMENT OF THE CASE

Petitioner's complaint for declaratory judgment, mandamus, injunction, and temporary restraining order, filed against the Directors of the Selective Service System of the United States and of the State of Missouri, and against members of Petitioner's Selective Service Local Board, praying judgment enjoining Defendants from inducting Petitioner into the Armed Forces of the United States based upon the illegal composition of Petitioner's Local Board, was denied.

The facts are these:

Petitioner registered as required by law with his local Selective Service board (Local Board No. 235) in St. Louis County, Missouri (App. p. A-19).

On December 10, 1968, he was classified III-A (hardship), and on March 4, 1969, he was reclassified I-A by the Local Board. On May 6, 1969, he was granted a personal appearance before the Board to contest his reclassi-

fication. The Board voted two-to-one to continue his I-A classification. Petitioner appealed to the State Appeal Board, which classified him by a vote of 3-0 in classification I-A on June 30th without stating any reasons for that action (App. p. A-19).

On June 30th the Board ordered Petitioner to report for induction on July 14th. Petitioner appeared at his Local Board on July 2nd and requested Selective Service Form 150 (Special Form for Conscientious Objectors), which he completed and returned to the Local Board on July 8th (App. p. A-20).

On July 9th, Petitioner was informed that his induction had been postponed until further notice (App. p. A-20).

On September 12th, during the period of postponement, Petitioner informed the Local Board that he had just discovered that his wife was pregnant, and he requested a III-A classification (registrant with a child or children). He furnished the Board with a statement from his wife's physician indicating that she was pregnant and would be confined for delivery of their child on or about May 7, 1970. The Board took no action on Petitioner's request for classification 1-O (conscientious objector) or for classification III-A (registrant deferred because of fatherhood). On October 22, 1969, Petitioner was ordered to report for induction on November 7, 1969 (App. p. A-20).

On October 31, 1969, Petitioner filed his complaint in the United States District Court for the Eastern District of Missouri.

On November 5, 1969, while this action was pending before the District Court, the Board sent Petitioner a letter stating that his file had been reviewed on November 4th, but his classification had not been reopened. On November 6th, Petitioner's order to report for induction was again postponed (App. p. A-3).

Petitioner moved for a preliminary injunction, and at the hearing, the attorney for the government made a motion to dismiss the action for lack of jurisdiction. At the same time, the parties stipulated that one of the three members of the board who was present on May 6, 1969 (Mr. Arunski) lived outside of the county in which the board sits, but did live in that county at the time of his appointment. Another member present on that date (Mr. Saffa) resided outside of the area of the board, but within the county over which the board exercised jurisdiction (App. p. A-15).

In his complaint, Petitioner asserted that the classification action taken on May 6th and the subsequent action taken by the Board on November 4th, were null and void for the reason that the presence of at least three lawfully constituted members of the board was necessary to constitute a quorum, and that the presence of a "member" (Arunski), who resided outside of the political boundaries of the county of which the local board had jurisdiction resulted in lack of a quorum at that meeting (App. pp. A-17–A-25).

Petitioner further alleged that at least two classification decisions remained to be resolved following the May 6th meeting, including his post-induction notice claims to classification as a conscientious objector and to classification III-A by reason of fatherhood. Petitioner asked the District Court to declare the local board improperly constituted, and to order Respondents to replace those members who did not fulfill the statutory and regulatory residence requirements with new members. Petitioner also requested that the Court enjoin Respondents from inducting him into the Armed Forces prior to reconsideration of his case by a lawfully constituted local board (App. p. A-24).

The District Court denied relief on the grounds that it lacked jurisdiction under 50 U.S.C., App. 460 (b) (3) (App. p. A-16).

The appeal was argued before the Eighth Circuit in May, 1970. In July, 1970, board member Arunski, who resided outside of the political boundaries of St. Louis County, Missouri, was removed from membership on the board, and was transferred to membership on a different board which exercises jurisdiction over the area in which Arunski lives. Petitioner informed the Court of Appeals of this fact in his Motion for Re-Argument. That Motion was denied without a hearing (App. p. A-47).

The decision of the Court of Appeals was rendered June 18, 1971 in an opinion reprinted herein (App. p. A-1).

REASONS FOR GRANTING THE WRIT

I

This Court can perform no more important function today than to use its appellate power to insure that young men subject to military conscription are not deprived of their liberty through the Selective Service System's violation of its congressional franchise and its own regulations. This is such a case.

Certiorari should be granted because the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court. The question presented is one of great importance and there is a widespread conflict among certain decisions of Courts of Appeals and decisions in a number of District Courts. This Court has held that in cases where there is (a) an important question, and (b) a conflict between Circuit Court decisions and District Court decisions, certiorari will be granted. **Calhoon v. Harvey**, 379 US 134, 137 (1964); **United States v. Constantine**, 296 US 287, 290 (1935).

Since this case comes up on the granting of a motion to dismiss the complaint, all of the allegations of the complaint must be accepted as true.

The Importance of the Question

The issue presented for review is not simply the technical construction of an administrative regulation. The issue is whether the entire concept of local Selective Service boards, the so-called "little group of neighbors," is to be a genuine working system which guarantees to draft registrants a careful, sympathetic and understanding consideration of his claim for deferment.

When Congress enacted the Military Selective Service Act of 1967, it included specific provisions to establish eligibility for membership on Selective Service Local Boards. Section 460 (b) (3) of 50 U.S.C., App., provides in part that ". . . each member of any local board shall be a civilian who is a citizen of the United States residing in the county or political subdivision corresponding thereto in which such local board has jurisdiction. . . ." In implementing this portion of the Act, the Selective Service System established Regulation 32 C.F.R. 1604.52 (c) requiring that:

> "The members of local board shall be citizens of the United States who shall be residents of a county in which their local board has jurisdiction and who shall also, if at all practicable, be residents of the area in which their local board has jurisdiction."

These residency requirements are not accidental; the "community citizen" concept of local boards is the foundation of the entire Selective Service System. In the words of the Director of Selective Service:

> "The present Selective Service System is not an experiment. The history of compulsory military service in this country has made one fact abundantly clear. No system of compulsory service in this country would long endure without the support of the people.

> The people of the country will support a compulsory system only to the extent that they have confidence in its fairness and they will have confidence in the system only to the extent which they themselves operate it. The Selective Service System is, therefore, founded upon the grass roots principle, in which boards made up of citizens in each community determine when registrants shall be made available for military service. There are more than 4,000 of these local boards located in every community throughout the land. More than 40,000 citizens contribute their services without pay as members of these local boards, and in various capacities as advisors to the local board and to the registrants."

Memorandum from General Lewis Hershey on **Present Operations of the System and the Local Draft Boards**, S. Doc. No. 82, 89th Congress, 2d Sess. 4 (1966).

> "The choice of who is to serve is being made by the neighbors of the man, and we think that the thing must be kept simple enough so that the average citizen can see how it works . . ."

76th Congress, 3d Sess. 384 (1940).

In 1965, President Johnson established the National Advisory Commission on Selective Service to investigate the workings of the System. That Commission recommended that the authority of local boards be drastically curtailed in favor of "Area Boards". **Report: In Pursuit of Equity: Who Serves When Not All Serve?**, 17 (1967) (pp. 1-36). In re-enacting the Military Selective Service Act of 1967, Congress explicitly rejected this recommendation, and retained the local boards' autonomy in that Act. Following the release of the National Advisory Commission's report, the President established the Task Force on the Structure of the Selective Service System to study

the recommendations of the National Advisory Commission. That Task Force's recommendation included a strong statement urging the retention of the Local Board system, and stated in part:

> "The structure providing for the local boards rather than area offices . . . is of greatest importance in the 'judgment' type cases . . . still more important is the fact that local citizens possess greater in-depth knowledge of social and economic conditions in their respective communities than employees of area offices could be expected to have . . ."

Task Force on the Structure of the Selective Service System, X-2 (1967).

The concept of a "little group of neighbors" has been central to the Selective Service System since its inception. **United States v. Nugent,** 346 U.S. 1, 8 (1953).

It is almost literally impossible for a draft board registrant to determine the residence addresses of the members of his board or of any other official connected with the local operation of the Selective Service System. In fact, Regulation 32 C.F.R. 1606.62 (c) prohibits the release of addresses of local board members except under very limited circumstances not available to registrants of the boards.

This Court should note, as did the Court of Appeals, that Selective Service Regulation 32 C.F.R. 1604.52 (c) was recently amended to delete the ". . . if at all practicable . . ." requirement of that Regulation. At the time Petitioner's case was considered by the local board, the dual requirements of residency both within the county and area of the local board were in effect. Under the amended Regulation, the only requirement is that members reside within the county in which the local board has jurisdiction.

It is a fundamental rule of administrative law that an agency which promulgates a regulation should be required to comply with that regulation. **Oshatz v. United States,** 404 F2d 9, 11-12 (9th Cir., 1968); **Service v. Dulles,** 354 US 363 (1957).

Of paramount importance is the fact that, as a result of the decision of the Court of Appeals in this case, a Selective Service registrant ordered to report for induction into the Armed Forces by an illegally constituted local board has absolutely no remedy at law. The Eighth Circuit has held that the defense of improperly constituted local boards will not lie in either a criminal prosecution or habeas corpus action, **United States v. Chaudron,** 425 F2d 605, 611 (8th Cir., 1970), or in a pre-induction suit. Even in the absence of the explicit statutory residence requirements, the unavailability of a legal remedy raises grave constitutional questions under the Fifth Amendment.

Conflict Between Circuit Courts and District Courts

There is a direct conflict between certain decisions of Circuit Courts of Appeals and decisions of District Courts. Although no Circuit or District Court has yet decided the residency question under that portion of the Regulation requiring residency within the county, several District Courts and at least one Circuit Court have ruled that relief is available to a Selective Service registrant, in defense to a criminal prosecution, under the "if at all practicable" provision of 32 C.F.R. 1604.52 (c). **United States v. Cabbage,** 430 F2d 1037 (6th Cir., 1970); **United States v. Lemke,** 310 F.Supp. 1298 (ND Cal., 1969); **United States v. Beltran,** 306 F.Supp. 385 (ND Cal., 1969); **United States v. Jones,** 2 SSLR 3392, Crim. No. 4124 (CD Cal., 1969). Since the requirement of residence in the county is more stringent, these courts would hold that relief is available in such cases.

In contrast to the above decisions, several Courts have held that Selective Service registrants may not attack an illegally composed local board by way of defense to a criminal prosecution or injunction. **United States v. Chaudron**, supra; **United States v. More**, 437 F2d 939 (9th Cir., 1971); **Czepil v. Hershey**, 425 F2d 251, 252 (7th Cir., 1970).

This direct conflict among decisions of different federal Courts creates confusion. The government has no guidelines as to whether it can prosecute. This Court is, therefore, the proper forum to resolve this conflict.

Quo Warranto Is Not an Appropriate Remedy.

In its opinion in the case at bar, the Eighth Circuit states that:

> "The undisputed evidence establishes that Ryan's local board was improperly constituted. One member was not a resident of St. Louis County, having moved to another county after his appointment. Another member resided within St. Louis County but outside of the area in which the board had jurisdiction. The presence of both members was necessary to establish the quorum of three that ruled on Ryan's various requests . . ." (App. p. A-3).

The Court held nevertheless that the decision of the Board to deny Petitioner's request for hardship deferment (by a vote of 2-1) was a valid decision; that the refusal of the Board to consider the post-induction conscientious objector and fatherhood claims, made by the Board **after** the filing of the complaint in the District Court, was proper; and that the qualifications of the members of the local board are not subject to attack by mandamus or declaratory judgment, ". . . but must be challenged directly" (App. p. A-4). Although the Court does not di-

rectly so state, the only remedy left available to correct an illegally composed local board is a quo warranto proceeding.

Quo warranto is totally inadequate because such an action is not brought by an individual but must be brought by the government. **Johnson v. Manhattan Ry. Co.**, 289 US 479, 502 (1932). The United States Attorney has the discretion to decline to bring a quo warranto lawsuit. **United States v. Machado**, 306 F.Supp. 995, 1001 (ND Cal., 1969).

It is doubtful if quo warranto is available to replace improperly constituted local boards, since the majority view seems to be that the remedy can be invoked only where specifically authorized by statute. **Cleveland-Cliffs Iron Co. v. Village of Kinney**, 262 F. 980, 984 (D. Minn., 1919); **Morin v. City of Stuart**, 111 F2d 773, 775 (5th Cir., 1940).

The impracticality of quo warranto is amply demonstrated in the case at bar. After stipulating in the trial court that members Arunski and Saffa did not meet the residency requirements of the statute and Selective Service regulation, the United States Attorney took no action to correct the situation. It was only until July, 1970, some nine months after Petitioner instituted his action, that Mr. Arunski was removed from Local Board 235 through the action of the Director of Selective Service for Missouri (App. pp. A-31, A-50).

Because it is impossible to bring a quo warranto proceeding, Petitioner has no adequate remedy at law, and should be permitted to obtain relief in equity. Where quo warranto is not an adequate remedy, and is not available to one aggrieved by a government body, the Plaintiff may proceed by mandamus or other equitable means to obtain relief. **United States v. Lemke**, 310 F.Supp. 1298 (ND

Cal. 1969); **United States v. Machado**, 306 F.Supp. 995 (ND Cal., 1969).

Review Is Not Barred by 50 U.S.C., App. Section 460 (b) (3).

Section 10 (b) (3) of the Military Selective Service Act of 1967 is not a bar to review of the Petitioner's Selective Service classification. This is readily apparent from the fact that the Eighth Circuit did not review the decision of the District Court, did consider Petitioner's claim on its merits, and did not affirm the dismissal on jurisdictional grounds.

Moreover, the complaint in this case asserts that the Local Board is guilty of violation of its own Regulations. Therefore, the holdings of this Court in **Oestereich v. Selective Service System Local Board No. 11**, 393 U.S. 233 (1968) apply to the fact situation at bar. In that case, this Court held that pre-induction judicial review is authorized in cases involving a violation of Selective Service regulations, characterized as "regulatory lawlessness."

The facts in the case at bar are critical to the issue of "regulatory lawlessness." They show that shortly after he received his induction notice, Petitioner requested that the board consider his claim to classification as a conscientious objector and his claim to classification III-A on the basis of his wife's pregnancy. The Board did not even look at Petitioner's Selective Service file until four days after he filed his complaint in the Circuit Court (App. pp. A-2, A-3).

At the time he filed his request for consideration as a conscientious objector, Selective Service regulations provided for consideration of such a request without requiring re-opening of the classification with its subsequent rights to personal appearance and appeal. Local Board

Memorandum No. 41 (rescinded August 27, 1970) provided in part that:

> "(b) If upon consideration of this (conscientious objector) evidence, the local board determines that it cannot grant the 1-A-O or 1-O classification claims, the local board should invite or request the registrant to meet with it for an interview prior to classification. The primary purpose of the interview will be to develop further facts on which the conscientious objector claim is based, and the sincerity of such claim. This interview does not take the place of a personal appearance which the registrant may request under Section 1624.1 after the classification action."

In asking the local board to classify him III-A (fatherhood) based on his wife's pregnancy, Petitioner relied on **United States Ex Rel. Kellogg v. McBee**, 2 SSLR 3253 (ND Ill., 1969) and **United States v. Bruinier**, 293 F.Supp. 666 (D Ore., 1968), which hold that a registrant who furnishes proof of his wife's pregnancy at any time prior to the date for which he is ordered to report for induction is eligible for classification III-A. See also, **Talcott v. Reed**, 217 F2d 360 (9th Cir., 1954). The Eighth Circuit declined to follow these cases (App. p. A-8).

Our argument in this case is directed to both the past and future classification decisions of Petitioner's local board. His action, filed on October 30, 1969, asked the Court to hold the board's classification decision of May 6, 1969 to be illegal; and to restrain the improperly constituted board from future classification actions on the basis of the unresolved questions in his Selective Service file. Four days after these proceedings were initiated in the District Court, the same improperly constituted local board examined Petitioner's Selective Service file and declined to take any action on his request for conscientious objector status or fatherhood deferment. In

arriving at this decision on both of these classifications, the improperly constituted board exercised the discretion granted it by statute without even affording Petitioner the courtesy of a face-to-face confrontation with the board. It is one thing to find, as did the Court of Appeals, that the prior acts of an improperly constituted local board may not be attacked by mandamus or declaratory judgment. It is an entirely different thing to hold that the local board may continue to act on a registrant's case, exercising its awesome powers in discretionary areas, **after** the registrant complains of the illegal status of members of the board. It is our position that the personal appearance of May 6, 1969, was a nullity, and that the Court erred in failing to enjoin the board from further actions subsequent to the filing of Petitioner's suit.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted

FRANCIS L. RUPPERT
American Civil Liberties Union
111 South Meramec, Suite 420
Clayton, Missouri 63105
Attorney for Petitioner

September 24, 1971

APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 20,092

John Michael Ryan,
Appellant,

v.

Lewis B. Hershey, as Director of the Selective Service System of the United States; Major General Adams, as Director of Selective Service System of the State of Missouri; and Alex J. Arunski, Louis T. Saffa, Robert J. Concanon, and John Sherod, as Members of Selective Service System Local Board No. 235,
Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

[June 18, 1971]

Before VOGEL, Senior Circuit Judge, HEANEY and BRIGHT, Circuit Judges.

HEANEY, Circuit Judge.

John Michael Ryan appeals from a decision of the United States District Court for the Eastern District of Missouri dismissing his complaint for pre-induction re-

lief. Ryan contended below that his local draft board was improperly constituted and thus without authority to order his induction, that he was entitled to a III-A classification because his wife became pregnant before he was inducted, and that he was entitled to be classified as a conscientious objector. The trial court held that Ryan, as a registrant, lacked standing to question the composition of the board and that, under 50 U.S.C.A. App. §460(b)(3), the court had no jurisdiction to review Ryan's other contentions. We affirm the judgment of the District Court.

A brief statement of facts is necessary to an understanding of the issues:

Ryan, a resident of St. Louis County, Missouri, registered with his local board on September 14, 1961. He was deferred several times for reasons not germane to this appeal. As of December 10, 1968, he was classified III-A (hardship). On March 4, 1969, he was reclassified I-A. On May 6, he was granted a personal appearance to contest his reclassification. The board voted two-to-one to continue Ryan's I-A classification. Ryan appealed to the State Appeals Board, which classified him I-A.

On June 27, Ryan notified his board that he was married.

On June 30, the board ordered Ryan to report for induction on July 14. Ryan then obtained forms for requesting conscientious objector status, which he completed and returned to his board on July 8. On July 9, the board clerk informed Ryan that his induction was postponed until further notice.

On September 12, Ryan requested a III-A classification on the grounds that his wife was pregnant. This request was accompanied by the appropriate doctor's certificate attesting to his wife's pregnancy. On October 22, Ryan was ordered to report for induction on November 7. He filed this action on October 31, 1969.

Ryan subsequently received a letter, dated November 5, stating that the board had reviewed his file and had found no justifiable cause to reopen his classification. On November 6, Ryan's induction was again postponed, until December 7.

On November 10, Ryan wrote to his board seeking a personal appearance to explain his position as a conscientious objector. He again requested a III-A deferment on the basis of his wife's pregnancy, and asked to be permitted to appear before a legally constituted board. This letter had not been answered as of the date of the District Court hearing.

Ryan's petition was heard on December 5, 1969.

THE COMPOSITION OF THE LOCAL DRAFT BOARD

The undisputed evidence establishes that Ryan's board was improperly constituted. One member was not a resident of St. Louis County,[1] having moved to another county after his appointment. Another member resided within St. Louis County but outside of the area in which the board had jurisdiction.[2] The presence of both members

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[1] 50 U.S.C.A. App. § 460(b)(3) provides in pertinent part:

"* * * [E]ach member of any local board shall be a civilian who is a citizen of the United States residing in the county or political subdivision corresponding thereto in which such local board has jurisdiction * * *."

[2] At the time of the events giving rise to this appeal, the pertinent regulation, 32 C.F.R. § 1604.52(c), stated:

"The members of local boards shall be citizens of the United States who shall be residents of a county in which their local board has jurisdiction and who shall also, if at all practicable, be residents of the area in which their local board has jurisdiction."

Exec. Order No. 11,360, 3 C.F.R. § 1604.52 (1967). The regulation has since been amended to remove the area residency requirement.

was necessary to establish the quorum of three that ruled on Ryan's various requests.

Notwithstanding the fact that one or more of the board members may not have met statutory and regulatory membership criteria, each of the members held his office under color of authority derived from appointment, however irregular, and discharged his duties on behalf of the public. Thus, his qualifications to act were not subject to attack by Ryan in a collateral proceeding.[3]

We recognize that a number of Courts, our own included, have denied relief to inductees in cases similar to this on the grounds that the area residence requirement is directory rather than mandatory. We are also aware that some Courts, including this one, have stated or implied that they might reach a different result if a member, necessary to establish a quorum, were not a resident of the county.[4] We cannot speak for the other Courts, but this Court now holds that the qualifications of a local draft board member are not subject to collateral attack, but must be challenged directly.[5]

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[3] *Ex Parte Ward*, 173 U.S. 452 (1899); *United States v. Brooks*, 415 F.2d 502, 505 (6th Cir. 1969), *cert. denied*, 397 U.S. 969 (1970); *Clay v. United States*, 397 F.2d 901, 911 (5th Cir. 1968), *vacated on other grounds*, 394 U.S. 310 (1969); *DuVernay v. United States*, 394 F.2d 979, n. 6 (5th Cir. 1968), *aff'd by an equally divided Court*, 394 U.S. 309 (1969); *Jessen v. United States*, 242 F.2d 213, 215 (10th Cir. 1957); *United States v. Richmond*, 274 F.Supp. 43, 61 (C.D. Cal. 1967).

[4] *United States v. Chaudron*, 425 F.2d 605, 611 (8th Cir. 1970); *United States v. More*, 436 F.2d 939 (9th Cir. 1971); *United States v. Berger*, 434 F.2d 610 (9th Cir. 1970); *United States v. Reeb*, 433 F.2d 381 (9th Cir. 1970); *Czepil v. Hershey*, 425 F.2d 251, 252 (7th Cir. 1970).

[5] *United States v. Cabbage*, 430 F.2d 1037, 1042 (6th Cir. 1970), would appear to reach a result contrary to the one we reach. In *Cabbage*, the Court stated:

> "We find it intolerable, however, to send appellant back for reclassification by a board which the United States govern-

THE FATHERHOOD DEFERMENT

The second question raised is whether the District Court erred in holding that, because of 50 U.S.C.A. App. §460(b)(3),[6] it did not have jurisdiction to review the board's failure to grant Ryan a III-A classification when he submitted proof that his wife had conceived a child *after his receipt of an induction notice* but before he was actually inducted.

Section 460(b)(3) does not foreclose pre-induction review by a federal court where the underlying evidentiary facts are not in dispute and the registrant's claim is cast as a challenge to the legality of the Selective Service System's reading or application of relevant law, if, on investigation of the merits of the issue presented, the federal court determines that the board acted in a blatantly lawless manner.[7] Here, the evidentiary facts are not in dispute and the registrant challenges the Selective Serv-

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ment has stipulated to be improperly constituted under the Selective Service regulation [three members of a five-man board lived within the county but outside the board's area boundaries] without any practical remedy for such violation. The principle of administration of the Selective Service system by potential draftees' 'friends and neighbors' is deeply buried in the history of the Selective Service Act. * * *"

United States v. Lemke, 310 F.Supp. 1298 (N.D. Cal. 1969), is the best reasoned of the cases reaching a result different from ours.

[6] 50 U.S.C.A. App. § 460(b)(3) also states:

"* * * No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, * * * after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form * * *."

[7] *Breen v. Selective Service Board No. 16*, 396 U.S. 460 (1970); *Oestereich v. Selective Service Board No. 11*, 393 U.S. 233 (1968).

ice System's application of law. Thus, some investigation of the merits is required.

We read the Selective Service Act of 1967[8] as authorizing the President to grant or to withhold fatherhood deferments, and to determine the classes of persons to whom such deferments will be granted, if at all. Thus, the President could have limited the deferment to inductees whose children were born prior to receipt of notice of induction, or he could have extended it to all those whose wives had conceived prior to the date of induction. But the President took a middle course and limited the granting of fatherhood deferments because of unborn children to those inductees who notified the board that their wives were pregnant prior to their receipt of a notice of induction.[9] While we may or may not agree that the line is

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[8] 50 U.S.C.A. App. § 456(h)(2) provides in part:

"* * * Except as otherwise provided in this subsection, the President is also authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service in the Armed Forces of any or all categories of persons who have children, or wives and children, with whom they maintain a bona fide family relationship in their homes. * * *"

[9] At the time of Ryan's request for III-A classification, 32 C.F.R. § 1622.30 stated:

"(a) In Class III-A shall be placed any registrant who has a child or children with whom he maintains a bona fide family relationship in their home and who is not a physician, dentist or veterinarian. * * *

"(c)(3) No registrant shall be placed in Class III-A under paragraph (a) of this section because he has a child which is not yet born unless prior to the time the local board mails him an order to report for induction which is not subsequently cancelled there is filed with the local board the certificate of a licensed physician stating that the child has been conceived, the probable date of delivery, and the evidence upon which his positive diagnosis of pregnancy is based."

The fatherhood deferment provided by 32 C.F.R. § 1622.30(a) was suspended by Exec. Order No. 11,527 (35 F.R. § 6571, § 6572, April 23, 1970), but the Order provides that those entitled to the deferment who requested it prior to the date of the Order shall still be entitled to it thereafter.

drawn equitably, we do not believe that it poses any constitutional or legal problems. It is nothing more than a good faith effort to meet a difficult problem. *Cf., United States v. Dell' Anno,* 436 F.2d 1198 (9th Cir. 1971); *United States v. Watson,* No. 20,399 (8th Cir. May 11, 1971).

Our review of the regulation convinces us that there is no merit to Ryan's claim that he was entitled to a fatherhood deferment. He plainly and simply did not come within its terms.

Ryan next argues that the Board was required by 32 C.F.R. §1625.2(b) to reopen his classification. This regulation provides:

> "The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant, * * * if such request is accompanied by written information presenting *facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification* * * * provided * * * the classification of a registrant shall not be reopened after the local board has mailed to such a registrant an Order to Report for Induction (SSS Form No. 252) * * * unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control." (Emphasis added.)

We cannot see how this regulation is helpful to Ryan. Under the facts of the case, his wife's pregnancy would not "* * * if true, * * * justify a change in the registrant's classification * * *". We have previously found the fatherhood deferment, when based on the existence of unborn children, to be limited by regulation to those persons who, prior to being sent an induction notice, inform the board of their impending fatherhood. Ryan did not meet this criterion. See, *Mulloy v. United States,* 398 U.S. 410 (1970); *United States v. Watson, supra.*

A draft board, even after the issuance of an induction notice, may regard conception as a factor in finding a registrant eligible for a III-A hardship deferment,[10] but that case is not presented here. *Cf., Talcott v. Reed,* 217 F.2d 360 (9th Cir. 1954).

To the extent that *United States ex rel. Kellogg v. McBee*, 2 SSLR 3253 (N.D. Ill. 1969), and *United States v. Bruinier*, 293 F.Supp. 666 (D. Ore. 1968), hold to the contrary, we decline to follow them.

THE CONSCIENTIOUS OBJECTOR CLAIM

Ryan urges that his local draft board acted improperly in refusing to reopen his classification to consider his claim of conscientious objection. Any doubts about a registrant's right to reopening on this basis, after he has received an induction notice, were laid to rest by the Supreme Court's recent decision in *Ehlert v. United States,* ... U.S. ... (April 21, 1971). *Ehlert* makes clear that a registrant has neither a statutory nor a constitutional right to reopening in such circumstances. Thus, the local board was within its discretion in refusing to reopen Ryan's classification. *Drake v. Selective Service Local Board No. 50, Hennepin County, Minnesota,* No. 20,477 (8th Cir. 1971). Ryan will still have an opportunity to present his claim to conscientious objector status after his induction. *Ehlert v. United States, supra.*

Ryan further maintains that the board acted improperly in refusing his request for a personal appearance to explain his request for conscientious objector status. We find no merit to this argument.

A registrant is entitled to a personal appearance only if (1) he requests one within thirty days of a reclassi-

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[10] 32 C.F.R. § 1622.30(b).

fication, or (2) the board reopens his classification. 32 C.F.R. §1624.1(a), §1625.13; *Davis v. United States,* 410 F.2d 89 (8th Cir. 1969). See also, *United States v. McQueary,* 408 F.2d 493 (9th Cir. 1969), *vacated on other grounds,* 399 U.S. 526 (1970); *United States v. Jones,* 384 F.2d 781 (7th Cir. 1967). *Cf., United States v. Rundle,* 413 F.2d 329 (8th Cir. 1969); *United States ex rel. Vellrath v. Volatile,* 303 F.Supp. 1025 (E.D. Pa. 1970).

Ryan does not contend that he filed a timely request for a personal appearance, or that the board reopened his classification.

Since the board was not required to reopen Ryan's classification, *Ehlert v. United States, supra,* it was not required to grant him a personal appearance.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

United States District Court
Eastern District of Missouri
Eastern Division

John Michael Ryan, Plaintiff,

vs.

Lewis B. Hershey, as Director of the Selective Service System of the United States; Major General Adams, as Director of Selective Service System of the State of Missouri, and Alex J. Arunski, Louis T. Saffa, Robert J. Concanon, and John Sherod, as Members of Selective Service System Local Board No. 235, Defendants.

No. 69 C 361 (2)

JUDGMENT

(Filed December 17, 1969)

This matter is pending on plaintiff's complaint for declaratory judgment, mandamus, injunction, and temporary restraining order, and his motion for summary judgment, and upon the defendants' motion to dismiss. The facts have been stipulated. A memorandum dated this day is hereby incorporated in and made a part of this judgment.

It Is Hereby Ordered that the cause be and the same is dismissed for lack of jurisdiction.

Dated this 17th day of December, 1969.

/s/ James H. Meredith
United States District Judge

United States District Court
Eastern District of Missouri
Eastern Division

John Michael Ryan, Plaintiff,

vs.

Lewis B. Hershey, as Director of the Selective Service System of the United States; Major General Adams, as Director of Selective Service System of the State of Missouri; and Alex J. Arunski, Louis T. Saffa, Robert J. Concanon, and John Sherod, as Members of Selective Service System Local Board No. 235, Defendants. } No. 69 C 361 (2)

MEMORANDUM

(Filed December 17, 1969)

John Michael Ryan has filed this petition for declaratory judgment, mandamus, injunction, and temporary restraining order. The defendants are Lewis B. Hershey, Director of the Selective Service System; Major General Adams, Director of the Selective Service System of Missouri; and Alex J. Arunski, Louis T. Saffa, Robert J. Concanon, and John Sherod, members of the Selective Service Board No. 235. Jurisdiction is alleged under 28 U.S.C. 1331, 1361, 2201, 2282, and 2284, and under the provisions of the Selective Service Act of 1967, 50 U.S.C. App. 451.

Plaintiff is a registrant of Local Board 235 of St. Louis County, Missouri. He registered with the Selective Service System on September 14, 1961. From that date until 1968 he had various classifications, including II-S (Student) and III-A (hardship). On December 10, 1968, plaintiff was classified III-A, because of extreme hardship to de-

pendents. On March 4, 1969, he was reclassified I-A. On April 28, 1969, plaintiff was found medically acceptable for military service.

On May 6, 1969, Ryan personally appeared before Local Board 235 and claimed his right to be classified III-A because of extreme hardship to dependents. Plaintiff was classified I-A by a vote of two to one. On June 30, 1969, he was classified I-A by the appropriate appeal board. On June 30, 1969, the local board mailed plaintiff an order to report for induction on July 14, 1969. On July 2, 1969, he requested and was given SSS Form 150 for conscientious objectors. This form was returned completed on July 8, 1969.

On July 9, 1969, plaintiff was advised that his induction originally scheduled for July 14, 1969, was postponed until further notice. On September 12, 1969, plaintiff requested that the local board change his classification to III-A. In support of this request, plaintiff submitted a statement from his physician indicating that his wife was pregnant, and would be confined for delivery of the child on or about May 7, 1970. On October 29, 1969, the Missouri State Headquarters of the Selective Service System informed plaintiff's employer that no error or omission had occurred in plaintiff's processing to date. A letter dated November 5, 1969, informed Ryan that the local board reviewed his file on November 4, 1969, but could find no justifiable cause for reopening his classification.

The first question this Court must decide is that of jurisdiction. Section 50 U.S.C. App. 460(b)(3) states:

> "No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title . . ."

The Supreme Court has held that the above-mentioned section will not sustain a literal reading. **Oestereich v. Selective Service Local Board No. 11**, 393 U.S. 233 (1968); **Clark v. Gabriel**, 393 U.S. 256 (1968). In the **Oestereich** case the Court allowed preinduction judicial review where the local board classified a divinity student I-A as a punitive measure. This action was without statutory basis and in conflict with plaintiff's right explicitly established by statute and not dependent upon an act of judgment by the board. In **Gabriel** the Court did not allow preinduction review of plaintiff's claim for conscientious-objector status, because an act of discretion was involved. From these two cases it would seem that judicial review is possible only when the board is refusing to grant a classification or exemption that is mandatory under the statute. If the board has any discretion, then judicial review is not possible.

In the present case the Court must examine plaintiff's allegations to determine if the acts were a breach of a mandatory duty or involved discretion. He alleges that the board had a duty to reopen his classification when he claimed status as a conscientious objector and as III-A. As previously noted, he received an induction order before he requested either of these classifications. He further alleges that he should have been given an opportunity to personally appear before the board in making his claim as a conscientious objector in accordance with Local Board Memorandum No. 41 (as Amended July 30, 1968). It is the opinion of the Court that because of 32 C.F.R. 1625.2, that memorandum applies only when making a claim as a conscientious objector before an order to report for induction. After a registrant has received an order to report for induction, his rights are governed by 32 C.F.R. 1625.2 which states in part:

> ". . . the classification of a registrant shall not be reopened after the local board has mailed to such

> registrant an Order to Report for Induction . . . unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

The Court will assume that the above-quoted regulation has as a minimum requirement that the local board consider whether or not to reopen a registrant's classification. But before it can reopen, it must specifically find a change of circumstances. The local board considered plaintiff's claims at a meeting, failed to find a change of circumstances over which he had no control, and so notified the plaintiff. This is the only thing the board is required to do. Had it given his claims no consideration at all, **Oestereich** might apply. It did consider the claim and found no change in circumstances. This decision would seem to be a discretionary function within the meaning of **Gabriel.** In appellate courts it has been consistently held in criminal cases that the local board does not have to reopen where the claim of conscientious objector status is made after an order to report for induction. **United States v. Kanner**, 416 F.2d 522 (9th Cir. 1969); **United States v. Maine**, ... F.2d ... (10th Cir. 1969); **United States v. Jennison**, 402 F.2d 51 (6th Cir. 1968); **DuVernay v. United States**, 394 F.2d 979 (5th Cir. 1968), aff'd 394 U.S. 309 (1969); **Davis v. United States**, 374 F.2d 1 (5th Cir. 1967); **Parrott v. United States**, 370 F.2d 388 (9th Cir. 1966), cert. denied **Lawrence v. United States**, 387 U.S. 908 (1967); **United States v. Al-Majied Muhammad**, 364 F.2d 223 (4th Cir. 1966); **Keene v. United States**, 266 F.2d 378 (10th Cir. 1969).

This case is distinguishable from **Davis v. United States**, 410 F.2d 89 (8th Cir. 1969), in that here the induction order was postponed and in **Davis** it was cancelled. There the Court indicated that "the board's authority to reconsider a registrant's classification is limited

after the issuance of an induction order." *Id.* at 93. The board is powerless to reopen a classification after the order to report for induction has been mailed, unless it specifically finds there has been a change in the registrant's status resulting from circumstances over which he had no control. **DuVernay**, supra, at 981. In this case the board considered whether or not there had been a change in circumstances over which the registrant had no control and found that there had not been such a change. If this Court reviewed the board's reasons for not reopening, it would be reviewing an exercise of discretion which is prohibited by the **Gabriel** case. Therefore, it is the opinion of the Court that it is without jurisdiction in this matter.

Plaintiff's other contention involves the composition of the local board. It has stipulated that one member of the board currently lives outside of the county in which the board sits, but did live in the county at the time of his appointment. Another lives outside of the area of the board, but within the county. The statute, 50 App. U.S.C. 460 (b)(3), states that all members of the board shall reside within the county over which the board has jurisdiction. The regulations, 32 C.F.R. 1604.52(c), indicate, in addition to the statutory residency requirement, that a board member be a resident of the area over which the board has jurisdiction, if at all practicable. There is, however, no provision in the statute for attacking the actions of the local board because a member of the board lives outside the county of the board's jurisdiction. The Tenth Circuit has held that where a member of a local board lived within the county of the board's jurisdiction at the time of his appointment and later moved to another county, a registrant could not challenge the composition of the board in a criminal prosecution. The member was a de facto officer and his acts as such are valid so far as the public and third parties having an interest in them

are concerned. **Jessen v. United States,** 242 F.2d 213 (10th Cir. 1957). It is the opinion of the Court that the qualifications of the members of the board are not subject to attack by registrants and do not give this Court jurisdiction.

The Court adopts the foregoing as its findings of fact and conclusions of law. It is the opinion of this Court that it has no jurisdiction in this case. An order will be entered dismissing the cause.

Dated this 17th day of December, 1969.

/s/ James H. Meredith
United States District Judge

APPENDIX C

In the United States District Court
Eastern District of Missouri
Eastern Division

John Michael Ryan,
Plaintiff,

vs.

Lewis B. Hershey, as Director of the Selective Service System of the United States; Major General Adams, as Director of Selective Service System of the State of Missouri; and Alex J. Arunski, Louis T. Saffa, Robert J. Concanon, and John Sherod, as Members of Selective Service System Local Board No. 235,
Defendants.

No. 69 C 361(2).

PETITION FOR DECLARATORY JUDGMENT, MANDAMUS, INJUNCTION, AND TEMPORARY RESTRAINING ORDER

I

This court has jurisdiction over this action under 28 U.S.C., Sec. 1331, because the action arises under the Constitution of the United States, specifically under the Fifth Amendment, and also under the Military Selective Service Act of 1967 (50 U.S.C. App., Sec. 451 et seq.), and under 28 U.S.C., Sec. 1331, 1361, 2201, 2282 and 2284.

II

The matter in controversy, exclusive of interest and costs, exceeds the sum of $10,000.00.

III

Plaintiff is a citizen of the United States, a resident of the State of Missouri, and registrant of Selective Service System Local Board No. 235, which is located at 3915 St. Timothy Lane, St. Ann, Missouri 63074.

IV

Defendant Lewis B. Hershey is Director of the Selective Service System of the United States. He is chief executive officer of the Selective Service System and is charged with the duty of administering the provisions of the Act and the Regulations promulgated thereunder, his position having been created by the provisions of Sec. 10 of the Act (50 U.S.C. App. Sec. 460). Defendants Alex J. Arunski, Louis T. Saffa, Robert J. Concanon, and John Sherod are members of Selective Service System Local Board No. 235, located in St. Louis County, Missouri. Local Board No. 235 is a Selective Service Board created by the provisions of Sec. 10 of the Act (50 U.S.C. App. Sec. 460), and is charged with the duty of administering the provisions of the Act and the Regulations promulgated thereunder within its geographic area.*

V

Selective Service System Local Board No. 235 has jurisdiction over the plaintiff's Selective Service status and file, and is hereinafter referred to as "Local Board."

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* Defendant Adams, Director of Selective Service for Missouri, is the chief executive officer of the State Selective Service System. He is charged with the duty of administering the Act and Regulations in Missouri.

VI

Following is a brief chronology of the plaintiff's status as a Selective Service registrant as such status is relevant hereto:

1. In accordance with the provisions of the Universal Military Training and Selective Service Act of 1948, plaintiff registered with Local Board 235 on September 14, 1961.

2. On December 10, 1968, the Local Board placed plaintiff in classification III-A (registrant deferred by reason of extreme hardship to dependents).

3. On March 4, 1969, the Local Board reclassified plaintiff into classification I-A (available for Military Service).

4. On April 18, 1969, plaintiff received his Armed Forces physical examination at the Armed Forces Entrance and Examining Station, St. Louis, Missouri, and on April 28, 1969, Plaintiff was advised of his medical acceptability for Military Service.

5. On May 6, 1969, plaintiff appeared before his Local Board for a personal appearance. At that personal appearance, plaintiff asserted his right to be placed in classification III-A (registrant deferred by reason of extreme hardship to dependents). Three members of the Local Board were present at this meeting and plaintiff was able to identify two of them as Alex J. Arunski and Louis T. Saffa. As a result of this personal appearance, plaintiff was again classified I-A by a vote of 2-1.

6. On June 9, 1969, plaintiff appealed his I-A classification of May 6, 1969, and on June 30, 1969, he was again classified I-A by the appropriate appeal board, by a vote of 3-0.

7. On June 30, 1969, the Local Board mailed plaintiff and order to report for induction, ordering him to report on July 14, 1969.

8. On July 2, 1969, plaintiff appeared in person at the Local Board and requested and was given Selective Service Form 150 (special form for Conscientious Objector).

9. On July 8, 1969, plaintiff completed Selective Service Form 150 and returned it to the Local Board.

10. On July 9, 1969, the Local Board advised plaintiff that his induction originally scheduled for July 14, 1969, was postponed until further notice.

11. On September 12, 1969, while his original induction notice was postponed, plaintiff requested that the Local Board change his classification to III-A (registrant with a child or children). In support of this request, plaintiff submitted a statement from his physician indicating that plaintiff's wife was pregnant, and that plaintiff's wife would be confined for delivery of their child on or about May 7, 1970.

12. On October 22, 1969, the Local Board ordered plaintiff to report for induction on November 7, 1969.

13. On October 29, 1969, Missouri State Headquarters of the Selective Service System informed Plaintiff's employer that "no error nor (sic) omission has occurred in his processing to date." (Plaintiff's Exhibit A.)

VII

Plaintiff has been aggrieved by the conduct of Local Board 235 in their processing of his Selective Service File in at least the following respects:

1. Defendants Alex J. Arunski and Louis T. Saffa, two of the three members of Local Board 235 who were present at the meeting of May 6, 1969 at which Plaintiff was denied his request for classification III-A by a vote of 2-1 are not residents of the area in which their Local Board has jurisdiction. Defendant Saffa resides at 3448 St. Blase, St. Louis County, Missouri, which residence is within the

juridiction of Selective Service Local Board No. 236. Defendant Arunski resides at 5914a Leona, in the City of St. Louis, Missouri, within the jurisdiction of Selective Service Local Board No. 108.* The fact of their residency outside of the jurisdictional area of the Local Board 235 is in violation of Selective Service Regulations, to-wit:

> "The members of Local Boards shall be citizens of the United States who shall be residents of a county in which their local board has jurisdiction and who shall also, if at all practicable, be residents of the area in which their local board has jurisdiction" 32 CFR 1604.52 (C).

Since Local Board 235 was illegally constituted at Plaintiff's personal appearance of May 6, 1969, and since a quorum of members was not present at that meeting, the classification action taken by the Local Board on that date is null and void. As a result, Plaintiff's induction notice is violative of his rights under the Fifth Amendment to the Constitution of the United States, in that he has been deprived of due process of law.

2. Local Board 235 has failed or refused to meet to consider Plaintiff's application for classification as a Conscientious Objector, in accordance with Plaintiff's application filed on July 8, 1969. Plaintiff is, in fact and in law, a Conscientious Objector, and his application for such status establishes his prima facae right to that classification. Plaintiff has never been permitted to appear personally before the Local Board to assert his right to that classification. Failure of the Local Board to meet and consider plaintiff's application for classification as a Conscientious Objector, and failure of the Local Board to permit Plaintiff to appear personally before said Local Board to

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* Defendant's Arunski and Saffa have resided continuously at their respective addresses set out herein from May 6, 1969 to the date of filing of this petition.

assert his claim for Conscientious Objector classification is a denial of Plaintiff's rights to due process of law in violation of the Fifth Amendment of the Constitution of the United States.

3. Local Board 235 has failed and refused to meet to consider Plaintiff's application for classification III-A (registrant with child) filed by Plaintiff on September 12, 1969. Plaintiff's application of that date has established his prima facae right to such classification, and the Local Board's refusal to meet and consider such application deprives Plaintiff of due process of law, in violation of Plaintiff's rights under the Fifth Amendment of the Constitution of the United States.

4. The reclassification action taken by Local Board 235 on March 4, 1969, at which time the Local Board removed Plaintiff's III-A classification (registrant deferred by reason of extreme hardship to dependents) and reclassified Plaintiff into classification I-A, was arbitrary, capricious, and without any basis in fact. Such reclassification action deprived Plaintiff of due process of law, in violation of his rights under the Fifth Amendment of the Constitution of the United States.

5. On July 28, 1969, Defendant Lewis B. Hershey, as Director of the National Selective Service System, informed Honorable Stuart Symington, the United States Senator from Missouri, that:

> "On July 2, 1969, Mr. Ryan requested and was given a special form for Conscientious Objector (SSS Form 150). He has filed a claim for Conscientious Objector status and in due course the Local Board will give consideration to this claim." (Plaintiff's Exhibit B.)

6. In point of fact, Local Board 235 has held and refused to give consideration to Plaintiff's claim for Conscientious Objector status and such refusal deprived Plain-

tiff of due process of law, in violation of Plaintiff's rights under the Fifth Amendment of the Constitution of the United States.

VIII

Plaintiff is a Conscientious Objector within the meaning and purvue of Sec. 6 (J) of the Military Selective Service Act of 1967. Plaintiff will not submit to induction into the Armed Forces of the United States because he is a Conscientious Objector, and will be arrested, charged with a crime, and required to stand trial so that, regardless of the outcome, he will be required to mention this matter on many employment and educational applications throughout his life, all to his detriment.

1. Without immediate judicial restraint, Plaintiff may be inducted into the Armed Services, where he will face military orders that may make it impossible to complete adjudication of his claim to Conscientious Objector status, and where his claims will be tried by a tribunal constitutionally inferior to a tribunal to which he is entitled as a civilian.

IX

Plaintiff has exhausted his administrative remedies within the Selective Service System.

Wherefore, Plaintiff prays judgment:

a. Declaring that Defendant members of Local Board 235 have violated Plaintiff's rights under the Fifth Amendment to the Constitution of the United States, and his rights to be exempted from military training and service under Section 6 (J) of the Military Selective Service Act of 1967.

b. Declaring that Defendants Arunski and Saffa are prohibited, by law, from serving as members of Local Board 235, by reason of their failure to reside within the county and jurisdiction of said Local Board.

c. Ordering Defendants Hershey, Adams, and members of Local Board 235 to re-open Plaintiff's classification and to process his claim to Conscientious Objector status in a manner consistent with Plaintiff's rights to a fair and impartial hearing based on a consideration of all of the facts contained in Plaintiff's Selective Service File.

d. Ordering Defendants Hershey, Adams, and members of Local Board 235 to re-open Plaintiff's classification and to process his claim to classification III-A (registrant with child), in a manner consistent with Plaintiff's rights to a fair and impartial hearing based on a consideration of all of the facts contained in Plaintiff's Selective Service File.

e. Ordering Defendants Hershey, Adams, and members of Local Board 235 to re-open Plaintiff's classification and to process his claim to classification III-A (registrant deferred because of extreme hardship to dependents), in a manner consistent with Plaintiff's rights to a fair and impartial hearing based on a consideration of all the facts contained in Plaintiff's Selective Service File.

f. Ordering Defendant Local Board members to rescind their order for induction of Plaintiff into the Armed Forces of the United States.

g. Enjoining and restraining Defendants from ordering that Plaintiff be inducted into the Armed Forces of the United States on the basis of the induction order presently issued to Plaintiff, or any subsequent induction order issued prior to a reopening and reconsideration of Plaintiff's claim to classification as set out herein.

h. Granting such other and further relief as to the Court seems just and proper.

Dated: October 31, 1969.

RUPPERT and SCHLUETER
By FRANCIS L. RUPPERT
Attorney for Plaintiff
111 South Meramec
Clayton, Missouri 63105
721-4333

VERIFICATION

State of Missouri }
County of St. Louis } ss.

John Michael Ryan, being duly sworn, deposes and says that I am the Petitioner herein; that I have read the foregoing Petition for Declaratory Judgment, Mandamus, Injunction and Temporary Restraining Order; that the allegations of fact therein are true except that when the allegations are made upon the basis of information and belief and as to those I believe them to be true.

JOHN MICHAEL RYAN
No. 23-235-43-717

Seal

Subscribed and sworn to before me this 31st day of October, 1969.

.....
Notary Public

My Commission Expires:

Plaintiff's Ex. A

(SSS Emblem)

Selective Service System
Missouri State Headquarters
411 Madison Street
Jefferson City, Missouri 65101

In Reply Refer to
File No. 5-14-5

29 October 1969

Joint Council of Teamsters No. 13
300 South Grand Boulevard
St. Louis, Missouri 63103

Attention: Mr. H. J. Gibbons, President

Subject: John Michael Ryan
SS No. 23-235-43-717

Gentlemen:

The complete selective service file of your staff member, the subject registrant, has been reviewed by both this Headquarters and our National Headquarters, and we can assure you that no error nor omission has occurred in his processing to date, and that every consideration and privilege appertaining to him was afforded in his case, and that he should now arrange to report for induction in accordance with the order therefor issued by his local board.

We trust that the above is the information you desire.

For the State Director
/s/ M. C. Griswold
M. C. Griswold
Lt. Colonel, AGC
Classification Officer

cc: SSBd#235

Plaintiff's Ex. B

(SSS Emblem)

Office of the Director

National Headquarters
Selective Service System
1724 F Street N.W.
Washington, D. C. 20435
Address Reply to the Director of Selective Service

July 28, 1969

Honorable Stuart Symington
United States Senate

Subject: John Michael Ryan
SS No. 23-235-43-717

Dear Senator Symington:

Returned are the enclosures which were received with your communications dated July 7, and July 13, 1969, concerning the subject registrant.

The selective service file of this registrant reveals that he met with his local board on May 6, 1969 and at that time no evidence was produced which would qualify him for Class III-A (extreme hardship deferment, or registrant with a child or children). After considering all the information in the file the local board determined to classify him in Class I-A (available for service) the registrant appealed and the appeal board determined on June 20, 1969 to classify him in Class I-A.

An Order to Report for Induction (SSS Form 252) was mailed on June 30, 1969 with a reporting date of July 14, 1969. The date to report for induction has been postponed pending a review of this case.

On July 2, 1969, Mr. Ryan requested and was given a Special Form for Conscientious Objector (SSS Form 150). He has filed a claim for conscientious objector status and in due course the local board will give consideration to this claim.

I trust this information will be of assistance to you.

Sincerely yours

/s/ Lewis B. Hershey
Director

Enclosures

APPENDIX D

In the United States Court of Appeals
For the Eighth Circuit

John Michael Ryan,
Appellant,
vs.
Lewis B. Hershey, et al.,
Appellees.
No. 20,092.

September Term, 1969

APPELLANT'S APPLICATION FOR STAY OR WRIT OF INJUNCTION PENDING REVIEW ON APPEAL

and

MOTION FOR RE-ARGUMENT, OR IN THE ALTERNATIVE TO REMAND CAUSE TO THE DISTRICT COURT FOR FURTHER FINDINGS OF FACT

Comes now the Appellant, by the undersigned as his attorney, pursuant to the Federal Rules of Appellate Procedure and the Rules of the United States Court of Appeals for the Eighth Circuit, and moves the Court to enter its order enjoining Appellees from ordering Appellant to report for induction into the Armed Forces of the United States on November 9, 1970, and to grant additional argument before this Court or in the alternative, to remand this cause to the District Court for further findings of fact. In support of this Motion, Appellant respectfully states to the Court as follows:

(1) Appellant is a registrant of Selective Service System Local Board 235, located in Olivette, Missouri. On

October 22, 1969, the Clerk of that Local Board ordered Appellant to report for induction on November 7, 1969.

(2) On October 31, 1969, Appellant filed his Petition for Declaratory Judgment, Mandamus, Injunction, and Temporary Restraining Order in the United States District Court for the Eastern District of Missouri. On November 6, 1969, as a result of a request by the United States Attorney, Appellant's induction was postponed until December 7, 1969.

(3) On December 5, 1969, Appellant's Petition was heard by Honorable James H. Meredith, and the cause taken under advisement. Shortly thereafter, Appellant's order to report for induction was postponed until January 7, 1970.

(4) On December 17, 1969, the District Court dismissed Appellant's suit on the basis that the Court lacked jurisdiction to grant the relief requested.

(5) On December 29, 1969, Appellant filed his Application for Writ of Injunction on Stay Pending Review on Appeal with the United States District Court for the Eastern District of Missouri, and on December 31, 1969, that Court denied the relief requested in the Application. On December 30, 1969, Appellant filed his Application for Stay or Writ of Injunction Pending Review on Appeal in the United States Court of Appeals for the Eighth Circuit, and on January 5, 1970, that Court denied the relief requested.

(6) On January 7, 1970, in accordance with orders contained in the postponement of induction issued December 7, 1969, Appellant appeared as ordered at the Armed Forces Entrance and Examining Station, St. Louis, Missouri, and declined to be inducted into the Armed Forces of the United States.

(7) On May 13, 1970, this Court heard oral argument by the parties hereto. As of the date of the filing of this application and motion, this Court has not yet announced its decision.

(8) In his original Petition for relief filed in the District Court, Appellant alleged and proved that Local Board 235 was located in St. Louis County, Missouri, and that Mr. Alex J. Arunski, a member of that Local Board, resided within the limits of the City of St. Louis, Missouri, in violation of 32 CFR 1604.52(c). Appellant alleged that Mr. Arunski's participation in Appellant's classification decisions rendered those decisions, and Appellant's subsequent induction notice, invalid.

Appellant is informed and believes that Mr. Arunski was removed from membership of Local Board 235 in July or August of 1970, and has been transferred to membership of a Selective Service Local Board located in the City of St. Louis, Missouri, where Mr. Arunski resides. Appellant is further informed that Mr. Arunski's transfer from Local Board 235 was effected through the Office of the State Director of Selective Service. Appellant respectfully suggests to the Court that it is reasonable to conclude that the State Director of Selective Service determined that Mr. Arunski's status as a member of Local Board 235 was illegal at the time Mr. Arunski participated in Appellant's classification process.

(9) On October 27, 1970, Local Board 235 mailed Appellant an order to report for induction into the Armed Forces of the United States, ordering him to report at Armed Forces Entrance and Examining Station, St. Louis, Missouri, on November 9, 1970, at 6:30 a.m. (Exhibit A, attached hereto). Appellant respectfully states to the Court that he previously reported for induction as ordered by Local Board 235 on January 7, 1970, and on that date was processed for induction by employees of the Armed

Forces Entrance and Examining Station, St. Louis, Missouri, and declined to submit to induction into the Armed Forces.

Appellant respectfully suggests to the Court that his current order to report for induction on November 9, 1970, is arbitrary, capricious, and in violation of Appellant's rights under the Fifth Amendment to the Constitution of the United States, for the reason that Appellees are again requiring Appellant to place himself in jeopardy of criminal prosecution for an additional induction arising out of the Local Board's original induction order of June 30, 1969.

(10) In the original proceedings before the United States District Court of the Eastern District of Missouri, Appellant alleged and proved that on July 8, 1969, after he was ordered to report for induction but prior to the date of reporting, Appellant completed and returned Selective Service Form 150 (Special Form for Conscientious Objectors) to the Local Board. Appellant further alleged and proved that he made repeated requests to be permitted to appear personally before Local Board 235 to assert his claim to status as a conscientious objector, but that Local Board 235 had failed and refused to permit Appellant to appear personally before them.

Appellant respectfully states to the Court that sixteen months have elapsed between the filing of his claim to classification as a conscientious objector and the filing of this instant motion, and Appellant's Local Board has refused to permit Appellant to appear before them to assert his claim to status as a conscientious objector.

In their Supplementary Memorandum in Support of Motion to Dismiss before the United States District Court, Appellees noted that:

> "However, as to the contention of Plaintiff that this Court should order board proceedings after an in-

duction order has been mailed and contrary to the regulations, the observation must be made that such action would result in chaos and inconsistency. There must be a terminating point, for if there is not, new filings, appeals, hearings, and personal appearances could delay induction interminably. Thus, the rationale behind existing regulations concerning reclassification after the mailing of the induction order precludes the action sought by the Plaintiff."

Appellant suggests that the conduct of the Local Board 235 in adamantly refusing to personally confront Appellant to determine his right to classification as a conscientious objector, where such refusal covers the span of sixteen months, clearly refutes the logic behind Appellees' argument that ". . . such action would result in chaos and inconsistency." As this Court has previously noted,

"Undoubtedly, where a registrant presents a claim for conscientious objector status when his induction is imminent and when he has already been deferred for other reasons, the Board is likely to view his claim and motives with considerable suspicion. Yet moral and religious values are subject to change, particularly as a young man reaches and enters maturity. There is little likelihood that such a person can be afforded a fair hearing without being allowed to personally present his claim." **Davis v. United States**, 410 F2d 82 (CA 8, 1969).

Wherefore, Appellant moves the Court to grant the relief requested herein.

Dated: November 4, 1970.

/s/ FRANCIS L. RUPPERT

FRANCIS L. RUPPERT
Attorney for Appellant
111 South Meramec, Suite 415
Clayton, Missouri 63105
721-4333

Certificate of Service

A copy of the above foregoing mailed to United States Attorney, Attorney for Appellees, U.S. Court and Custom House, 12th and Market Streets, St. Louis, Missouri, this 4th day of November, 1970.

F. L. RUPPERT

Exhibit A

(SSS Emblem)
Selective Service System
Selective Service Board No. 235
9740A Lackland Road
Overland, Missouri 63114

October 27, 1970

In Reply, Refer to:
23-235-43-717

John M. Ryan
826 Leland
St. Louis, Missouri 63130

Dear Sir:

At the request of the State Director of Selective Service we are terminating the postponement of induction afforded in your case and issued on 3 December 1969.

You are hereby ordered for induction into the Armed Forces of the United States, and to report at 12th & Spruce Streets, Mart Building, St. Louis, Missouri (use Spruce St. entrance) on November 9, 1970 at 6:30 A.M. promptly.

For the Local Board No. 235
/s/ Geneva Warren
Geneva Warren
Executive Secretary

APPENDIX E

United States Court of Appeals
For the Eighth Circuit

John Michael Ryan,
Appellant,
vs.
Lewis B. Hershey, et al.,
Appellees.

No. 20092
September
Term, 1969

APPELLANT'S MOTION TO SUBMIT ADDITIONAL EVIDENCE IN SUPPORT OF HIS MOTION FOR REARGUMENT, PREVIOUSLY SUBMITTED, AND AN AFFIDAVIT IN SUPPORT OF SAID MOTION

Comes now your Appellant, by the undersigned as his attorney, pursuant to the Federal Rules of Appellate Procedure and the Rules of the United States Court of Appeals for the Eighth Circuit, and moves the Court to receive into evidence the matter contained in the affidavit and documents attached to this motion. In support of this motion, Appellant respectfully states to the Court as follows:

(1) On November 4, 1970, Appellant submitted his Appellant's Application for Stay or Writ of Injunction Pending Review on Appeal, and, Motion for Reargument, or in the Alternative to Remand Cause to the District Court for Further Findings of Fact.

(2) On November 6, 1970, this Court entered its order enjoining Appellees from inducting Appellant into the Armed Forces of United States, and in addition ordered Appellees to respond to Appellant's Motion for Reargument filed as aforesaid.

(3) On November 13, 1970, Appellees filed their reply to Appellant's Motion for Reargument as aforesaid, alleging that Appellant has not stated reasons or facts which would require further argument before this Court or the presentation of further argument before the District Court in this matter.

(4) In both Appellant's Brief and in his Motion for Reargument, Appellant stated to the Court that he was ordered to report for induction by January 7, 1970, and in accordance with said order, Appellant appeared at the Armed Forces Entrance and Examining Station, St. Louis, Missouri, and declined to be inducted into the Armed Forces of the United States.

(5) In early September, 1970, more than one year after Appellant filed his application for classification as a conscientious objector, and eight months after Appellant declined to be inducted into the Armed Forces of the United States, Lt. Colonel M. C. Griswold, Deputy State Director for the Selective Service System for the State of Missouri, wrote to the United States Attorney in St. Louis, Missouri, and informed that officer that:

> ". . . we would believe that the registrant's refusal to submit to induction on 7 January 1970 did not constitute a violation of UMT&S Act of 1967 under Section 12(a) thereof. Further, that at such time as the registrant's civil case shall be finally decided, or at such early date as you may feel to be appropriate, that the registrant's last postponement of induction should be terminated and the registrant afforded a new time and place of reporting by his Local Board as per Section 1632.2(d) SSR."

On October 22, 1970, the United States Attorney for the Eastern District of Missouri wrote to Lt. Colonel Griswold and stated that:

> ". . . at any rate since I anticipate the concluding of the civil case at any time now, it is appropriate to conclude the postponement at this point and afford the registrant the new time and place of reporting, as you note under Section 1632.2(d) SSR."

On October 26, 1970, Lt. Colonel McCain, of the State Headquarters of the Missouri Selective Service System, wrote to the Local Board and stated that:

> "The State Director hereby and accordingly directs that the postponement in the case authorized by the State Director at the request of the U.S. Attorney be terminated and that the Local Board schedule a new date and place for reporting . . ."

On October 27, 1970, Appellant's Local Board mailed Appellant an order to report for induction in the Armed Forces of the United States on November 9, 1970. This Court subsequently issued its order restraining Appellees from ordering Appellant's induction on that date.

On November 2, 1970, after having become aware of the new correspondence in his file, Appellant wrote to his Local Board and again requested the opportunity to appear personally before that Board to discuss his conscientious objection. A copy of said letter is attached hereto, designated Appellant's Exhibit 1.

On November 5, 1970, Lt. Colonel M. C. Griswold wrote to Appellant and advised Appellant that:

> "This letter is accordingly written to inform both you and your local board that, in view of the fact of your having been reported to the U.S. Attorney by the Commanding Officer of the St. Louis Examining and Entrance Station 8 January 1970, this Headquarters would believe that any action on the part of your board, whether acquiescence to the request

made in your letter or otherwise, would be entirely improper unless such action were taken either at the request or with the prior approval and concurrence of U.S. Attorney Bartlett, as in the case of the order issued to you by our local board under date of 27 October, 1970."

Said letter is attached hereto, designated as Appellant's Exhibit 2.

(6) On November 27, 1970, Appellant again wrote to his Local Board, again requesting an opportunity to appear personally before the Board to explain his conscientious objection. To date, Appellant's Local Board has not responded to that request.*

(7) Appellant is informed and believes that his recently reconstituted Local Board was not aware that he was ordered to report for induction, but that said order to report for induction was mailed to Appellant as a result of a conspiracy between the State Headquarters of the Selective Service System and the Executive Secretary of the Local Board. Appellant is further informed and believes that members of his Local Board were never apprised of his letter of November 2, 1970, for the reason that the Executive Secretary of his Local Board conspired with the Office of the State Headquarters of the Missouri State Selective Service System to prevent Appellant's Local Board from reading that letter.

(8) Appellant is informed and believed that a careful reading of his Selective Service file, beginning with the entry for July 8, 1969, the date on which Appellant completed his Selective Service Form 150 (Special Form for Conscientious Objectors) and returned it to his Local Board, clearly indicates that all of the actions taken by Appellant's Local Board with respect to his classifica-

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* Appellant's Exhibit 3.

tion were directed by the Office of the Missouri State Headquarters of the Selective Service System, including that Board's refusal to consider Appellant for classification as a conscientious objector. Appellant respectfully suggests that this abdication of classification responsibility of his Local Board is in derogation of the Military Selective Service Act of 1967, and is a violation of Appellant's rights under the due process clause of the Fifth Amendment to the Constitution of the United States.

(9) Appellant respectfully suggests that this Court has the responsibility to investigate the events and occurrences which have taken place since Appellant filed his Petition for Declaratory Judgment, Mandamus, Injunction, and Temporary Restraining Order on October 31, 1969. To that end, Appellant respectfully moves the Court to order reargument of this case on the basis of the ongoing series of events which have taken place since the filing of the original petition in this matter.

WHEREFORE, Appellant respectfully moves the Court to grant the relief requested herein.

December 11, 1970

Duppert and Schlueter
By Francis L. Ruppert
Attorney for Appellant
111 S. Meramec, Suite 415
Clayton, Missouri 63105
721-4333

State of Missouri }
County of St. Louis } ss

Francis L. Ruppert, being duly sworn, deposes and says that I am the attorney for Appellant John M. Ryan; and that I have read the foregoing Motion; that the allegations of fact therein are true except that when

the allegations are made upon the basis of information and belief and to those I believe them to be true.

Francis L. Ruppert

Subscribed and sworn to before me this 14th day of December, 1970.

(Illegible)

My Commission Expires: 2/5/72

Certificate of Service

A copy of the foregoing Motion was served on the United States Attorney, U.S. Court and Custom House, 12th and Market Streets, St. Louis, Missouri 63101, this 14th day of December, 1970, by depositing in regular U.S. Mails.

F. L. Ruppert

Appellant's Exhibit 1-A

826 Leland
St. Louis, Missouri 63130

November 2, 1970

Chairman,
Local Board No. 235
Selective Service System
9740 A Lackland Avenue
Overland, Missouri 63114

Dear Sir:

Since you first issued an order for me to report for induction sixteen months ago, I have been seeking a personal appearance before the members of Selectice Service Board 235 to discuss circumstances that I believe warrant your attention.

I request an opportunity to meet personally with the members of Local Board 235 to discuss the following matters: (1) my wife and I continue to live together and are now rearing a six month old son; and (2) my conscientious objector status has grown stronger as the level of violence, killing and war have increased during this sixteen month period both within this country and abroad.

My initial conscientious objector claim outlined that morally and through my religious training I believed that violence, war in any form and killing were wrong and that I could not participate in the armed services and remain faithful to my conscience. I further stated that this belief was the result of long years of religious training, experiences, and observation of the world around me.

During the past sixteen months many events as well as my religious training have served to reinforce my convictions that violence, killing and war in any form are not only immoral but that these actions do not resolve the problems and conditions that are given by their supporters as the "just cause" to be violent. The events of My Lai in Vietnam, the killings at Kent State, the bombings of universities and public buildings are the recent examples of violence, killing and war. Each of these killings have been justified by supporters of the "cause" that was being espoused but I reject all of these examples, even the bombings of ROTC facilities and draft boards which are tactics aimed at stopping the war because of my religious training and belief that all violence, killing and war are immoral. The events surrounding the My Lai massacre demonstrate

Appellant's Exhibit 1-B

November 2, 1970

convincingly the potential horror which may result from being a member of an organization which is devoted to the killing of other human beings. Surely, not all of the participants in that massacre (and the other unreported "incidents" which must be occurring from day to day) are not, by nature, killers of unarmed men and children. Association with the military clearly changes men from human beings to unreasoning, unfeeling animals. I do not—and will not—expose myself to such an influence, even in a non-combatant capacity.

In addition to these external events, my convictions have become stronger through my continued growth in the religious training which first brought me to these beliefs both through my personal readings and studies as well as through the formal teachings of my church.

My family and I would appreciate the opportunity to meet with the members of the local board to discuss my views as a conscientious objector. I feel that the written word cannot fully express the deep personal feelings involved in this belief.

John Michael Ryan
23-235-43-717

Appellant's Exhibit 2

(SSS Emblem)

Selective Service System
Missouri State Headquarters
411 Madison Street
Jefferson City, Missouri 65101

In Reply Refer to
File No. 5-29-5

5 November 1970

Mr. John M. Ryan
826 Leland
St. Louis, Missouri

SS No. 23-235-43-717

Dear Mr. Ryan:

Your local board of jurisdiction has forwarded your complete selective service file to this Headquarters in order that U. S. Attorney Bartlett's request for copies of items therefrom may be complied with, and we have noted your letter of 2 November 1970 which was received by your local board on 3 November 1970.

This letter is accordingly written to inform both you and your local board that, in view of the fact of your having been reported to the U. S. Attorney by the Commanding Officer of the St. Louis Examining and Entrance Station 8 January 1970, this Headquarters would believe that any action on the part of your Board, whether acquiescence to the request made in your letter or otherwise, would be entirely improper unless such action were taken either at the request or with the prior approval and concurrence of U. S. Attorney Bartlett, as in the case of the

order issued to you by your local board under date of 27 October 1970.

For the State Director
/s/ M. C. Griswold
M. C. Griswold
Lt. Colonel, AGC
Deputy State Director

cc: Local Board No. 235

Appellant's Exhibit 3-A

826 Leland Avenue
St. Louis, Missouri, 63130

November 27, 1970

Dear

On June 30, 1969, I received an induction order from Local Board 235, on July 10, 1969, I filed a claim of conscientious objector. Since July of 1969, I have been seeking a personal meeting with you and until recently I thought you were refusing to see me. Now I believe that the State Director of Selective Service and the Clerk of the Local Board have been intercepting and prohibiting you from seeing me.

As you are aware, I have filed a complaint against the composition of Local Board 235 with the Federal Court. My complaint was based on the fact that Mr. Arunski's place of residence constituted a violation of the law while he served on Local Board 235. I have been proven correct since he was transferred to a City draft board last summer.

You ordered me to report for induction on January 7, 1970 and because I am a conscientious objector I could

not accept induction. Recently, after all of this time, while my complaint against Local Board 235 is still pending before the Court of Appeals, Mrs. Warren sent a letter ordering me to report for induction a second time on November 9, 1970. When I received this second notice for induction I looked at my file and was surprised to see that both the U. S. Attorney and the State Director of Selective Service felt that I had been improperly ordered for induction in January, so I immediately wrote to you and again asked for an opportunity to meet with you. Within a few days I received a letter from Colonel Griswold which in effect says that I am a criminal and he advises me that he is prohibiting you from seeing me.

Why is Colonel Griswold making decisions without consulting you?

Appellant's Exhibit 3-B

Page Two.

I am a Conscientious Objector and I am perfectly willing to do Conscientious Objector work for two years.

Enclosed you will find copies of the correspondence that I mentioned in this letter.

Sincerely

John Michael Ryan
23-235-43-717

APPENDIX F

In the United States Court of Appeals
For the Eighth Circuit

John Michael Ryan,
Appellant,
vs.
Lewis B. Hershey, et al.,
Appellees.

No. 20092
September
Term 1969

APPELLANT'S SUPPLEMENTARY MOTION TO SUBMIT ADDITIONAL EVIDENCE IN SUPPORT OF HIS MOTION FOR RE-ARGUMENT, PREVIOUSLY SUBMITTED, AND AFFIDAVIT IN SUPPORT OF SAID MOTION

Comes now your Appellant, by the undersigned as his attorney, pursuant to the Federal Rules of Appellate Procedure and the Rules of the United States Court of Appeals for the Eighth Circuit, and moves the Court to receive into evidence the matter contained in the Affidavit and documents attached to this Motion. In support of this Motion, Appellant respectfully states to the Court as follows:

1. On November 4, 1970, Appellant submitted his Appellant's Application for Stay or Writ of Injunction Pending Review on Appeal, and Motion for Re-Argument, or in the Alternative to Remand Cause to the District Court for Further Findings of Fact.

2. On November 6, 1970, this Court entered its order in joining Appellees from inducting Appellant into the

Armed Forces of the United States, and in addition ordered Appellees to respond to Appellant's Motion for Re-Argument filed as aforesaid.

3. On November 13, 1970, Appellees filed their reply to Appellant's Motion for Re-Argument as aforesaid, alleging that Appellant has not stated reasons or facts which would require further argument before this Court or the presentation of further argument for the District Court in this matter.

4. In his original Petition for Relief filed in a District Court, Appellant alleged and proved that his Selective Service System Local Board No. 235 was located in St. Louis County, Missouri, and that Mr. Alex J. Arunski, a member of that Local Board, resided within the limits of the City of St. Louis, Missouri, in violation of 32 CFR 1604.52 (c). Appellant alleged that Mr. Arunski's participation in Appellant's classification decisions rendered those decisions and Appellant's subsequent induction notice invalid. More specifically, Appellant alleged that the last classification action on his Selective Service file was taken on May 6, 1969, at a personal appearance before his Local Board; that his Local Board consisted of four members at that time; that three of these four persons were present at that personal appearance, allegedly serving as members of Local Board No. 235; that Mr. Arunski was one of those three members present; and that Petitioner was classified 1-A by a vote of 2-1.

5. Appellant is informed and believes that Mr. Arunski was removed from membership of Local Board No. 235 in either July or August of 1970, and has been transferred to membership of a Selective Service Local Board located in the City of St. Louis, Missouri, where Mr. Arunski resides. Appellant is further informed and believes that

Mr. Arunski's transfer from Local Board No. 235 was effected through the office of the State Director of Selective Service. Appellant respectfully suggests to the Court that it is reasonable to conclude that the State Director of Selective Service determined that Mr. Arunski's status as a member of Local Board 235 was illegal at the time Mr. Arunski participated in Appellant's classification process.

6. Appellant is informed and believes that on May 6, 1971, that Mr. Bob Merrick, State Director of Selective Service for the Missouri Selective Service System, publicly announced that persons serving on Missouri Selective Service System Local Boards who live in Counties other than those over which said Local Boards claimed jurisdiction were serving in violation of Selective Service Regulations, namely, 32 CFR 1604.52 (c). Appellant is further informed and believes that State Director Merrick has taken action to remove and replace several members of St. Louis Selective Service Boards who have been serving on said Boards while residing in St. Louis County. (Appellant's Exhibit No. 1, attached hereto and incorporated and made part of this Motion.)

7. Appellant respectfully suggests that it is both inequitable and unjust to permit Respondents to claim that Board member Arunski's service on Appellant's Local Board No. 235 during his classification processing was not in derogation of Selective Service Regulations, and on the other hand to later publicly announce that Board members with Mr. Arunski's qualifications are serving in violation of Federal Regulations. Appellant respectfully suggests that this evidence is relevant and material to his Cause of Action, and that the Court should either schedule Re-Argument to include consideration of said evidence or, in the alternative, should Remand this Cause to the District Court for an Evidentiary Hearing.

Wherefore, Appellant respectfully moves the Court to grant the relief requested herein.

Dated: June 9, 1971.

Ruppert and Schlueter
By Francis L. Ruppert
Attorney for Appellant
111 S. Meramec, Suite 415
Clayton, Missouri 63105
721-4333

Francis L. Ruppert, being duly sworn, deposes and says that I am the attorney for Appellant John M. Ryan; and that I have read the foregoing Motion; that the allegations of fact therein are true except that when the allegations are made upon the basis of information and belief and to those I believe them to be true.

Francis L. Ruppert

Subscribed and sworn to before me this 9th day of June, 1971.

Mary Ann Murphy
Notary Public

My Commission Expires: 5/11/75

Certificate of Service

A copy of the foregoing Motion was served on the United States Attorney, U.S. Court and Custom House, 12th and Market Streets, St. Louis, Missouri 63101, this 9 day of June, 1971, by depositing in regular U.S. Mails.

F. L. Ruppert

EXHIBIT NO. 1

ST. LOUIS POST DISPATCH, MAY 6, 1971 3A

Nine Off Draft Boards Over Residence Rule

By TED GEST
Of the Post-Dispatch Staff

Nine of 17 members of St. Louis Selective Service boards who have been serving while residing in St. Louis County, a violation of a federal regulation, have resigned or have been replaced.

Bob Merrick, who was named Missouri Selective Service director earlier this year, said today he intended to insure that in the futur all draft board members lived in the areas taht their boards serve.

Merrick said that members still in violation of the regulation would be asked to resign. He said also that he would increase the membership of each of the 19 boards in St. Louis and St. Louis County to six or seven.

A Post-Dispatch inquiry last November disclosed that at least 17 of 41 St. Louis board members lived in St. Louis County, a violation of the regulation that local board members "shall be residents of a county in which their local board has jurisdiction."

'Groups of Neighbors'

The regulation is based on the Selective Service System's statement that draft boards should be "little groups of neighbors" of young men registered for the draft.

Last November, several of the draft boards in the St. Louis area were operating with the legal minimum of three members. Merrick said he would like to increase the number of members on boards to cope with possible expanded workloads in some areas.

Draft boards whose members resigned or were replaced since November include Board No. 103 in north St. Louis (one member), Board No. 104 in northeast St. Louis (five members), Board 109 in southwest St. Louis (one member and Board 110 in west central St. Louis (two members).

Dissident Appointed

In a related development, Missouri Selective Service officials have named a member of a group that has criticized the activities of Board No. 100 in Webster Groves to that board.

Mrs. Miriam Blumer of 1128 Elm Drive, Webster Groves, has become the sixth member of the board.

The citizens' group has charged that the board was indifferent to the concerns of young men registered with it. Last month, the group urged young men not to register with

Bob Merrick
Residence requirement

board No. 100 when they reached age 18 but to request transfer to other boards.

Merrick said that no young man from the area served by Board No. 100 had requested to be transferred to another board. He said that federal regulations specify that a man must be registered with the board that has jurisdiction over his residence and that no exceptions could be made.

Merrick said also that he was considering appointing a seventh member to the Webster Groves board.

Agreement Reached

At a meeting earlier this year between federal and state draft officials and the citizens' group, it had been agreed that at least one member of the group would be named to the board.

Mrs. Blumer said yesterday, "I want to see that every boy that comes before the board gets a fair and square hearing."

Mrs. Blumer said she had expressed concern that the board's executive secretary had assumed some of the board's authority. She said she had been assured by federal officials that the secretary should he considered an employe of the board.

APPENDIX G

("**Appendix A**" to Petitioner's Brief Before the Court of Appeals—Population of Local Board Area)

Municipality	Population Within Local Board 235—(1960 Census)*
Wellston (33%)**	2750
Hillsdale	2788
Velda Vill. Hills	1365
Uplands Park	549
Pine Lawn	5943
Goodfellow Terrace	824
Arbor Terrace	1225
Northwoods	4701
Beverly Hills	849
Pagedale (20%)	1020
Pasadena Hills	1315
Norwood Court (50%)	95
Pasadena Park	680
Normandy (75%)	3340
Bellerive	314
Greendale	1107
Bel-Nor	2388
Margona Village	320
Bel-Ridge	4395
Elmdale	712
St. John	7342
Woodson Terrace	6048
Berkeley (10%)	1860

* Where only a fraction of a municipality is located within the boundaries of Local Board 235, that Board has been credited with a proportionate part of the total population of the municipality.

** Figures in parenthesis are estimates of percentages of municipality area located within Local Board 235.

Municipality	Population Within Local Board 235—(1960 Census)*
Schuerman Heights	288
Edmundson	1428
St. Ann (40%)	6290
Bridgeton (60%)	4690
Hazelwood	6045
Bridgeton Terrace (95%)	600
Florissant (5%)	1900
Ferguson	100
Total	73231

* Where only a fraction of a municipality is located within the boundaries of Local Board 235, that Board has been credited with a proportionate part of the total population of the municipality.

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No. 71-435

In the Supreme Court of the United States

OCTOBER TERM, 1971

JOHN MICHAEL RYAN, PETITIONER

v.

CURTIS W. TARR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner brought a pre-induction civil suit in the United States District Court for the Eastern District of Missouri, seeking to enjoin his induction into the armed forces and to secure the reconstitution of his local draft board. He alleged that his order of induction was invalid because two members of his local board resided outside the area in which the board had jurisdiction,[1] one of the two having moved sometime

[1] 50 U.S.C. App. 460(b)(3) provides that "each member of any local board shall be a civilian who is a citizen of the United States residing in the county or political subdivision corresponding thereto in which such local board has jurisdiction." At the time petitioner appeared before his local board, the pertinent Selective Service regulation, 32 C.F.R. 1604.52(c),

after his appointment to another county. He also claimed that the board had erred in failing to consider his conscientious objector (I–O) claim and his fatherhood (III–A) claim, both of which were first raised after issuance of the order to report for induction.

The district court (Pet. App. A–11–A–16) dismissed the suit for lack of jurisdiction under Section 10(b)(3), 50 U.S.C. App. (Supp. V) 460(b)(3), and petitioner appealed. The court of appeals affirmed (Pet. App. A–1–A–9). It held first that the local board was a *de facto* board, and thus that its acts were valid and not subject to collateral attack. As for petitioner's challenge to his I–A classification, the court determined that pre-induction judicial review of the denial of exempt or deferred status was barred by Section 10(b)(3) of the Military Selective Service Act of 1967, 50 U.S.C. App. (Supp. V) 460(b)(3).[2]

Petitioner registered with Selective Service on September 14, 1961, and, after being granted several deferments not here relevant, he was classified I–A on March 4, 1969 (Pet. App. A–2). He requested and was granted a personal appearance to discuss with members of his local board the loss of

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(Rev. Jan. 1, 1970) also provided: "The members of local boards shall * * * if at all practicable, be residents of the area in which their local board has jurisdiction."

[2] That provision provides that: "* * * No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President except as a defense to a criminal prosecution instituted under section 12 of this Title [Section 462 of this Appendix], after the registrant has responded either affirmatively or negatively to an order to report for induction * * *."

a prior hardship (III–A) classification; following that meeting the board voted 2–1 to retain him in Class I–A. Petitioner then filed an administrative appeal, and, on June 30, 1969, the State Appeal Board, after considering the Selective Service file *de novo,* voted unanimously (3–0) to classify him I–A. That same day, the local board mailed to petitioner an order to report for induction on July 14, 1969 (Pet. App. A–19).

Thereafter, petitioner for the first time requested, and was mailed, the Special Form for Conscientious Objectors (SSS Form 150), which he completed and returned to the board on July 8, 1969; his induction was postponed. On September 12, 1969, he further submitted a doctor's certificate attesting to his wife's pregnancy (Pet. App. A–20), and asked for a fatherhood (III–A) deferment. Without considering either the conscientious objector claim or the fatherhood claim, the local board notified petitioner on October 22, 1969, that his reporting date had been rescheduled for November 7, 1969. On receiving this information, he instituted the present pre-induction civil suit on October 31, 1969.[3] The district court dismissed the complaint (Pet. App. A–11–A16), and the court of appeals affirmed (Pet. App. A–1–A–9).

1. Petitioner contends here, as he did below, that the fact that his local board was improperly con-

[3] Thereafter, but prior to the scheduled reporting date, the board notified petitioner, on November 5, 1969, that the new information submitted after the mailing of his induction notice did not warrant a reopening of his classification (Pet. App. A–3).

stituted under the then applicable county and area residency requirements (see n. 1 *supra*) is grounds for enjoining his induction in a pre-induction suit. The argument is premature.

a. Section 10(b)(3) of the Military Selective Service Act of 1967, 50 U.S.C. App. (Supp. V) 460(b)(3), bars petitioner's challenge to the board's "classification or processing" of his various claims for exemption or deferment until after he has responded to his order of induction. While this Court has recognized that preinduction judicial review may be available in a narrow category of cases, where it is necessary to reconcile a potential conflict between Section 10(b)(3) and other provisions of the Act mandating exemption or deferment (*Oestereich* v. *Selective Service Board*, 393 U.S. 233; *Breen* v. *Selective Service Board*, 396 U.S. 460),[4] this is not such a case. Neither the county (50 U.S.C. App. 460(b)(3)) nor the then applicable area (32 C.F.R. 1604.52(c)) residency requirements preclude a construction of Section 10(b)(3) that requires petitioner to raise his argument that the board was unlawfully constituted either in defense to a criminal prosecution after refusal of induction or in a habeas corpus proceeding after taking the symbolic step forward. See *Czepil* v. *Hershey*, 425 F. 2d 251,

[4] See the government's brief on the merits in *Fein* v. *Selective Service System Local Board No. 7*, No. 70-58, this Term, a copy of which is being furnished to petitioner's counsel. *Fein* presents the question of the proper interpretation of Section 10(b)(3) in the context of a pre-induction suit challenging certain Selective Service procedures as being unauthorized by statute and a denial of due process of law.

252 (C.A. 7), certiorari denied *sub nom. Czepil* v. *Tarr*, 400 U.S. 849; *Anderson* v. *Hershey*, 410 F. 2d 492, 496 n. 11 (C.A. 6).

b. Nor should petitioner be permitted to maintain an action in the nature of mandamus under 28 U.S.C. 1361,[5] purportedly seeking to compel these respondents to reconstitute the local board. It is well recognized that "judicial interference [under that provision] is not warranted * * * if the alleged irregularities are of such a nature as would not prevent a valid order ultimately issuing from the administrative agency." *Knoll Associates, Inc.* v. *Dixon*, 232 F. Supp. 283, 285 (S.D.N.Y.). As pointed out by the court below (Pet. App. A–5–A–9), such is the case here (see pp. 8–9 *infra*).

Moreover, none of the respondents named in this action is in a position to correct whatever defect there may be. No one of them is charged, by statute or otherwise, with the duty of appointing local board members.[6] Under the applicable statute (50 U.S.C. App. (Supp. V) 460(b)(3)), local board members are "appointed by the President from recommendations made by the respective governors * * *." Neither the President nor the governor is a defendant in this case, and the persons who are defendants have no power to

[5] The section provides: "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

[6] Petitioner named the following officials as defendants: Director of Selective Service; Missouri State Director of Selective Service; and Members of Local Board No. 235.

make appointments. Accordingly, there is no basis for mandamus against these respondents to take action which they have no legal duty—or, indeed, ability—to perform. See *Czepil v. Hershey, supra;* and cf. *Hudgins* v. *Circuit Court of Chesapeake, Virginia,* 294 F. Supp. 258 (E.D. Va.); *Hill* v. *U.S. Board of Parole,* 257 F. Supp. 129 (M.D. Pa.).

At all events, an application of 28 U.S.C. 1361 would be particularly inappropriate in this case, since the mandamus relief which petitioner seeks—*i.e.,* reconstitution of his local board—has already been accomplished. In July 1970, the board member who had earlier moved to another county was transferred to the board which exercises jurisdiction in the county where he now lives, and a new member who resides in the county was appointed; it is agreed that petitioner's board is now properly constituted under the statute.[7]

2. Even assuming that the courts below had jurisdiction to hear the merits of petitioner's claim, his attack on the improper constitution of his local board provides no basis for enjoining induction.

a. As pointed out by the court below, the board member living outside of the proper county at the time that petitioner's claims were processed was a resident of the county at the time of his appoint-

[7] The area residency requirement under 32 C.F.R. 1604.52 (c) (Jan. 1, 1970) was repealed by executive order on September 2, 1970 (Executive Order 11555, 35 Fed. Reg. 14191), amending Paragraph (c) of Section 1604.52, leaving as the only residency requirement that members of the local boards reside in the county served by the board (50 U.S.C. App. (Supp. V) 460(b)(3)).

ment, and thus "held his office under color of authority derived from appointment" (Pet. App. A–4). As this Court observed in *Ex parte Ward,* 173 U.S. 452, 456: "[T]he title of a person acting with color of authority, even if he be not a good officer in point of law, cannot be collaterally attacked." See *United States* v. *Collins,* 346 F. 2d 765 (C.A. 5), certiorari denied, 400 U.S. 919; *Jessen* v. *United States,* 242 F. 2d 213, 214–215 (C.A. 10).

Similarly, the failure of another board member to satisfy the then applicable "area residency" requirement is not sufficient to nullify action taken by the board. The regulatory provision that members reside in "the area in which their local board has jurisdiction" was by its terms not absolute, but rather turned on a determination of practicability; 32 C.F.R. 1604.-52(c) provided that local board members shall "if at all practicable, be residents of the area in which their local board has jurisdiction."

It has long been recognized that acts of draft boards, like those of malapportioned legislatures (cf. *Baker* v. *Carr,* 369 U.S. 186), "are acts of a de facto political authority," *Clay* v. *United States,* 397 F. 2d 901, 911 (C.A. 5), vacated on other grounds, *sub nom. Giordano* v. *United States,* 394 U.S. 310; *Sellers* v. *McNamara,* 398 F. 2d 893 (C.A. 5), certiorari denied, 395 U.S. 950. As such, they are valid despite irregularities in the composition of the board and are not subject to collateral attack. *Wright* v. *Ingold,* 445 F. 2d 109 (C.A. 7); *Collins* v. *United States, supra; Czepil* v.

Hershey, supra; cf. *Ex parte Ward,* 173 U.S. 452.[8]

b. Moreover, it is abundantly clear that petitioner is in no position to complain of the constitution of his local board on the facts of this case. Following his initial I–A classification by the local board on May 6, 1969, petitioner took an appeal to the State Appeal Board. After reviewing his file *de novo*, that board voted unanimously to classify him I–A on June 30, 1969. No challenge has been made to the procedures followed on appeal or to the composition of the State Appeal Board. Consequently whatever defect may have existed at the local board level was plainly cured on the administrative appeal. *Falbo* v. *United States,* 320 U.S. 549, 555 (Rutledge, J., concurring); *De-Remer* v. *United States,* 340 F. 2d 712, 719 (C.A. 8); *United States* v. *Jones,* 142 F. Supp. 806, 818 (E.D.S. C.), affirmed, 241 F. 2d 704 (C.A. 4); and see *United States* v. *Atherton,* 430 F. 2d 741, 744 (C.A. 9); *Landau* v. *Allen,* 424 F. 2d 668, 672 (C.A. 6).

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[8] Petitioner contends that there is a conflict among the circuits on this issue, citing *United States* v. *Cabbage,* 430 F. 2d 1037 (C.A. 6). In *Cabbage,* however, a criminal prosecution for refusal to report for induction, the Sixth Circuit declined to set aside an induction order on the ground that the local board was not properly constituted under 32 C.F.R. 1604.52(c). Since the order was invalidated on another ground, however, the court urged (without so ordering) that the board be reconstituted in accordance with the then existing area residency requirement, stating that Cabbage would not be subject to reclassification until this was done.

As for petitioner's post-induction-notice claims, they were never considered by the improperly constituted local board prior to commencement of this civil suit. Nor should they have been. On his claim for fatherhood (III-A) deferment, by the explicit terms of the then applicable regulation, 32 C.F.R. 1622.30(c)(3) (Rev. Jan. 1, 1970),[9] petitioner was entitled to no review by the local board because he had failed to submit a physician's certificate attesting to his wife's pregnancy "prior to the time the local board [mailed] him an order to report for induction * * *" (Pet. App. A–5–A–8). Similarly, the post-notice conscientious objector claim was foreclosed from board consideration. As this Court recently held in *Ehlert* v. *United States,* 402 U.S. 99, the appropriate forum for review of such claims is within the military after the registrant has submitted to induction. Since petitioner was not entitled to have these claims considered at all, the fact that the local board may at the time have been unlawfully constituted would not—even assuming *arguendo* the jurisdictional point—entitle petitioner to the injunctive relief he now seeks.

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[9] Executive Order No. 11527, April 23, 1970, 35 F.R. 6571, has terminated the availability of the III–A fatherhood deferment. This change, however, does not apply to persons, such as petitioner, who claim eligibility accruing prior to that date.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.[10]

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1971.

[10] In our view, this case is wholly different from *Fein*, *supra*, in that here petitioner is not entitled to exempt or deferred status as a matter of law. Moreover, his collateral challenge to the composition of the local board has been consistently rejected as a basis for setting aside action taken by the *de facto* administrative body. Accordingly, we see no need to delay disposition of this case pending the outcome of *Fein*.

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